DOBIE vs. THE TEMPORALITIES BOARD

IN THE

SUPERIOR COURT; MONTREAL,

JUDGMENT

BY

THE HONORABLE MR. JUSTICE JETTÉ,

29th DECEMBER, 1879.

MACMASTER, HALL & GREENSHIELDS FOR PETITIONER.

HON. J. J. C. ABBOTT, Q.C., M. M. TAIT, } COUNSEL.

JOHN L. MORRIS FOR RESPONDENTS.

STRACHAN BETHUNE, Q.C., C. P. DAVIDSON, Q.C., } COUNSEL.

(From *The Gazette*, January 5, 1880.)

Reverend ROBERT DOBIE, petitioner, vs. BOARD FOR THE MANAGEMENT OF THE TEMPORALITIES FUND OF THE PRESBYTERIAN CHURCH OF CANADA IN CONNECTION WITH THE CHURCH OF SCOTLAND, *et al.*, respondents.

The Reverend Robert Dobie, a minister of the Presbyterian Church of Canada, in connection with the Church of Scotland, a member of the Synod of the said Church, and a minister of the Saint Andrew's Church and congregation of Milton, in the Province of Ontario, obtained an injunction, the 31 December, 1878, against the Corporation, respondents, and against the Reverend M. M. Gordon, Cook, Jenkins, Lang and Mackerras; M. M. Morris, Walker, Darling, Dennistoun, Mitchell and Sir Hugh Allan, members of the said corporation, ordering them to abstain specially from disposing of the fund of the said Corporation, by making any payments therefrom, and generally from all acts of administration of the property under their control, until further order of Court. In spite of the proceedings of the respondents, to have this order set aside, the injunction thus far stands, and the question now before me is on the merits of the petitioner's claim. Although I have already given, in connection with an incidental proceeding in this case, an analysis of the legislation on which the present litigation is based, the importance of the suit, and the large number of persons, not parties thereto but interested therein, almost equally with the litigants themselves, leads me to recur to this legislation, so as to make the claims of the parties clear and easily understood. The Quebec Act (1774) had guaranteed to the Roman Catholic clergy, the right they possessed before the cession of this country to England, to demand and receive their customary *dimes* or tithes. The Protestant clergy saw in this guarantee a privilege accorded to the Roman Catholic Church which justified them in claiming a corresponding favor. In 1791, by the Statute 31 Geo. III., cap. 31 (amending the Quebec Act), the Imperial Parliament, wishing to acknowledge this claim, made provision for the support of a Protestant clergy in the two Provinces of Upper and Lower Canada, in sanctioning an appropriation by the governments of these two Provinces, of a reserve for this purpose of certain lands from the public domain. These lands thus appropriated were styled Clergy Reserves. In 1827, by the Act 7 and 8 Geo. IV., the Imperial Parliament authorized the sale of a part of these lands, on condition that the proceeds were invested in the public funds and the revenues exclusively applied to the maintenance of a Protestant clergy. In 1840 the Statute 3 and 4 Victoria, ch. 78, sanctioned the sale of all these lands, under certain restrictions as to the quantity to be sold annually. In 1853 the Imperial Parliament authorized the Legislature of the United Province of Canada to legislate for the management of the Clergy Reserves, with this restriction, that the moneys theretofore given to the clergy of the churches of England and Scotland, or to any other denomination of Christians, should not be withheld, reduced, or in any manner affected by the legislation of the said Province during the lives of the persons having a right in the said annual grant, (16 Victoria, ch. 21). By virtue of the powers conferred on it the Legislature of Canada enacted in 1854 (18 Victoria, ch. 2) that the proceeds of the lands con-

stituting the "Clergy Reserves" situated in Upper Canada and those in Lower Canada should form two separate and distinct funds, which should be styled, respectively, "The Municipal Fund of Upper Canada" and the "Municipal Fund of Lower Canada," and that, conformably to the Imperial Acts, these funds should be charged firstly, and in preference over any other charge, with the payment of the above-mentioned annual allowances to the Protestant clergy, during the lives of the incumbents, who had this right at the time of the sanction of the Statute 16 Victoria, ch. 78, namely, the 9th May, 1853. To secure this payment, it was enacted that the capital required to guarantee these annual allowances should be invested in the public funds, and the surplus, if any, apportioned to the municipalities of the said two Provinces, according to population. The rights which the Imperial Parliament desired to protect and secure under the Statute 16 Victoria, ch. 78, were thus preserved, but the system thus organized made the State the debtor for these annual appropriations, and the administrator of the fund representing the same, during the full term of the lives of the then incumbents. The third section of this law clearly indicates that this style of enactment adopted to satisfy the rule of the Imperial Act was not what our Parliament preferred. Anxious to put aside all appearance of union between Church and State, as it declared, and to settle promptly and finally all reclamations that might exist against these funds of the "Clergy Reserves" the Legislature by this 3 section authorized the Executive to commute and extinguish the same, with the consent of the parties interested, by the immediate payment of the capital (at the rate of 6 per cent) calculated on the basis of the probable life of each incumbent. At the beginning of this legislation the clergy of the Church of England had been alone benefitted and had raised the pretension of being solely entitled to the benefit of these reserved lands. But about the year 1820, the members of the Church of Scotland presented a claim, as well for their clergy as for those of the other Protestant denominations, for a share and interest in these Reserves, proportioned to the number of the members of each Church. This reclamation, for a long time contested and opposed, was finally admitted, and when the statute of 1854, to which I am about to refer, was passed, the right of the ministers of the Presbyterian Church of Canada in connection with the Church of Scotland to the benefits of this Statute had been for a long time acknowledged. The provisions of the law of 1854, relative to the commutation of the annual allotments, payable to each minister, appearing satisfactory, a meeting of Synod of said church was convoked to decide on united action in relation to this commutation. The meeting was held in January, 1855, and the following resolution unanimously adopted. "*Resolved*, 1st. That it is desirable that such commutation, if upon fair and liberal terms, should be effected; and that the Rev. Alexander Mathieson, D.D., of Montreal, the Rev John Cook, D.D., of Quebec, Hugh Allan, Esq., of Montreal, John Thompson, Esq., of Quebec, and the Hon. Thomas McKay, of Ottawa city, be the Synod's Commissioners, with full power to give the formal sanction of the Synod to such commutation as they shall approve, the said Commissioners being hereby instructed to use their best exertions to obtain as liberal terms as possible; the Rev. Dr. Cook to be Convener; three to be a quorum; the decision of the majority to be final, and their formal acts valid; but that such formal sanction shall not be given, except in the case of ministers who have also individually given them, the said Commissioners, power and authority to act for them in the matter, to grant acquittance to the Government for their claims to salary to which the faith of the Crown is pledged; and to join all sums so obtained into one Fund, which shall be held by them till the next meeting of Synod, by which all further regulations shall be made; the following, however, to be a fundamental principle which it shall not be competent for the Synod at any time to alter, unless with the consent of the Ministers granting such power and authority; that the interest of the fund shall be devoted, in the first instance, to the payment of £112, 10s each, and that the next claim to be settled, if the Fund shall admit, and as soon as it shall admit of it, to the £112, 10s; be that of the Ministers now on the Synod's Roll, and who have been put on the Synod's Roll since the 9th May 1853 and also, that it shall be considered a fundamental principle, that all persons who have a claim to such benefits, shall be Ministers of the Presbyterian Church of Canada, in connection with the Church of Scotland, and that they shall cease to have any claim on, or be entitled to any share of said commutation Fund whenever they shall cease to be Ministers in connection with the said Church. 2nd. That so soon as said commutation shall have been decided upon, and agreed to by the said Commissioners, the Rev. John Cook, D. D., of Quebec, shall be fully empowered and authorised and this Synod hereby delegate to the said Rev. John Cook full power and authority to endorse and assent to the several Powers of Attorney from the individual parties on behalf of the said Synod and in their name, and as their Act and deed, as evidencing their assent thereto. 3rd. That all Ministers be and they are hereby enjoined and entreated, (as to a

measure by which, under Providence, not only their own present interests will be secured, but a permanent endowment for the maintenance and extension of religious ordinances in the church), to grant such authority in the fullest manner, thankful to Almighty God that a way so easy, lies open to them for conferring so important a benefit on the church. 4th. That the aforesaid Commissioners be a committee to take the necessary steps to get an Act of Incorporation for the management of the General Fund so to be obtained; the aforesaid Commissioners to constitute the said Corporation till the next meeting of Synod, when four more members shall be added by the Synod." Agreeably to this resolution all the ministers of the said church gave full power to the Commissioners, named for this purpose by the Synod, to arrange with the Government, and to unite all the sums thus realized in a common fund, according to the terms of the said resolution. The commutation of the several individual reclamations produced a sum total of £127,448 5s 0d, which the Government handed to the commissioners named by the Synod. In 1858 these Commissioners, acting according to the instructions contained in the aforementioned resolution (§4), demanded and obtained from the Parliament of United Canada an Act creating a special corporation for the administration and the possession of this fund of £127,448 5s 0d, and of all other sums by which it might thereafter be increased. This corporation received the name of "The Board for the management of the Temporalities Fund of the Presbyterian Church of Canada in connection with the Church of Scotland" and is one of the respondents in this case. (22 Victoria. ch. 66). It is declared by this Statute that this corporation is created "for the management and holding of certain funds of the Presbyterian Church of Canada in connection with the Church of Scotland, now held in trust by certain commissioners, hereinafter named, on behalf of the said church and for the benefit thereof;" but by the first section it is enacted that "such holding is subject always to the special condition that the annual interest and revenues of the said moneys and fund now in their hands shall be and remain charged and subject, as well as regards the character as the extent and duration thereof, to the several annual charges in favor of the several ministers and parties severally entitled thereto, of the several amounts and respective characters and durations as the same were constituted and declared at the formation of the said funds and the joining of the same into one fund." * * * * * * *

The second section of this statute then provides for the mode of election and replacing of members of this board created a corporation as aforesaid. According to the dispositions of this section, the board shall be composed of twelve members, five being ministers and seven laymen; four of these members in order of seniority, viz., two ministers and two laymen retiring each year on the third day of the annual assembly of synod of said church, and being replaced by two ministers and two laymen elected by said synod. In case of death, resignation or absence from the Province, or withdrawal from communion in said church, the vacancies shall be filled by the other members of the board, subject to ratification of the appointments thus made by the synod at its next ensuing meeting, so that, as stated in the second section, "this board shall always consist of twelve members, five of whom shall be ministers and seven laymen, and all being ministers or members in full communion in said church." The members of this board, thus organized, thenceforth administered the property of said church conformably to the powers conferred on them without their right having ever been questioned until the occurrences which gave rise to the present litigation. It results from the facts proved, that from 1870 to 1874 a proposed fusion of the Presbyterian Church of Canada in connection with the Church of Scotland, with three other churches, viz.: The Canada Presbyterian Church; the Church of the Maritime Provinces in connection with the Church of Scotland; and the Presbyterian Church of the Lower Provinces, had been more or less discussed at different times. In 1874, the conditions of this fusion appearing to be acceptable to the parties interested, an Act was sought and obtained from the Legislature of Ontario, authorizing the union and fusion of the said churches, so as to form but one body or denomination of Christians, under the name of the "Presbyterian Church in Canada." This Act is the 38th Victoria, ch. 75, of the Statutes of Ontario, and was sanctioned the 24th December, 1874. The provisions of this Statute, of which the existence and authenticity are admitted, are of great importance, and have considerable bearing on the rights of the parties in this cause. It is therein firstly declared: That all the property situated in the Province of Ontario, and held at the time of the union of the said churches by every congregation in connection or communion with any of them, shall thenceforth belong to the said United Church, with this restriction, nevertheless, that those congregations of the said Churches which are unwilling to enter into this union might, within six months, declare their dissent by a vote of the majority of their members, and in such case the property of such congregation dissenting

should not be affected by the said Statute. Then Section 8 of this Statute declares that as the ministers of the Presbyterian Church of Canada in connection with the Church of Scotland are entitled to receive an annual revenue, proceeding from the funds styled the "Temporalities Fund," administered by a board incorporated by the heretofore Province of Canada, and as it is proposed to maintain intact for these ministers, during life, this annual revenue, it is enacted that the present members of this board shall continue in office and administer the said fund on behalf of the ministers now deriving a revenue therefrom; this revenue being preserved intact for the said ministers, so long as they shall remain Presbyterian ministers in good standing in the Dominion of Canada, whether in active service or retired, and whether they are or are not in connection with the said United Church. Lastly, that so soon as any part of the revenue provided from this fund is not required to meet the payment of the annual allowances coming to the said ministers, or of any other charge or expense on said fund, such part of said revenue shall be placed at the disposal of the said United Church; and after the death of the last survivors of said ministers, any balance of said fund shall belong to the said United Church. By a final enactment of the said statute, it is declared: that the union of the said churches shall be accomplished so soon as the terms of the said union are signed by the moderators of each of them. Such are, in substance, the provisions of this statute which bear on the present litigation.

At the same time that this legislation was obtained from the Legislature of Ontario, a similar law was sought from the Legislature of Quebec, which passed the statute 38 Victoria, ch. 62 (sanctioned the 23rd February, 1875.) This statute corresponds exactly with that of Ontario, and enacts firstly: that the ownership of the property situated in the Province of Quebec and belonging to every congregation in connection with any one of the said United Churches, shall pass immediately, on the consummation of the union to the said United Church, unless a vote of the majority of such congregation rejects such union, in which case the said property shall not be affected by this law. The 11th section of this statute then repeats, with certain modifications, the provisions of section 8 of the Statute of Ontario, relative to the Temporalities Board of the Presbyterian Church of Canada in connection with the Church of Scotland, and after having stated that this fund is administered by a Board incorporated by the hertofore Province of Canada, and that it is proposed to maintain the revenue of the said fund for the ministers having a right therein, and to their successors, even if the congregation over which they preside does not enter the union of the said churches, the section enacts:—"That the present members of the said Board shall continue in office and manage the said fund on behalf of the said ministers now deriving revenue therefrom, and the income to said ministers shall be continued to them and to their successors, as aforesaid, so long as such Presbyterian ministers are in good standing in the Dominion of Canada, whether exercising their ministry or retired, or whether they are or are not in connection with the united Church; provided that the successors of ministers of congregations, in the Province of Quebec, in existence at the period of the union, and not entering into the same, shall preserve the same rights to the benefits of the Temporalities Fund, as they would have had if such union had not occurred." It is further declared by the same section of this Act, that so soon as a part of the accumulated revenue of the said fund shall not be required for the payment of the annual allowances to the ministers entitled thereto, it shall pass to the said United Church, which shall have the property therein, and may dispose of it, and that it shall be the same with that which shall remain of the said fund, after the death of the last of the incumbents having a right in the said revenue. This 11th section also enacts, that each vacancy occurring in the said Temporalities' Board (namely, the Corporation respondents), shall not be filled in the manner heretofore adopted, but in the manner provided by an Act passed during the same session and entitled, "An Act to amend the Act intituled 'An Act to incorporate the Board for the management of the Temporalities' Fund of the Presbyterian Church of Canada in connection with the Church of Scotland.'" Lastly, section 14 enacts: that the union of the said churches shall be complete, so soon as a notice shall be published in the *Quebec Official Gazette* declaring that the articles of this union have been signed by the moderators of the said respective churches. As appears by this analysis, the enactments of these two statutes of Quebec and Ontario are substantially identical. The only differences to be observed are, 1st. That the statute of Quebec secures the right in the revenue of the Temporalities fund of the said Presbyterian Church of Canada in connection with the Church of Scotland, not only to the actual ministers as the Ontario statute does, but also to their successors; and 2nd, That the statute of Quebec subjects the filling of vacancies on the Temporalities Board, to the special provisions of the Act to which I am about to refer, while the statute of Ontario maintains purely and simply, the administration of this fund to the actual members of the Board.

At the same time that the Quebec Legislature passed the Act for the union of the said churches it passed another Act, 38 Victoria, ch. 64, to amend the Act of incorporation of the Temporalities Board of the said Presbyterian Church of Canada in connection with the Church of Scotland. This second act which is a natural sequence of the former one may be said to be its complement. The Legislature commences by declaring: that the union of the said churches and the resolutions of the Synod of the said Presbyterian Church of Canada, in connection with the Church of Scotland, adopted in consequence and referring to their temporalities, render it necessary to change certain regulations in the charter incorporating the said Board, wherefore it enacts:—1. That until the rights of the ministers and probationers of the said church in the said temporalities fund shall have ceased to exist, this property shall continue, as heretofore, entrusted to a Board, whose functions shall be continued, after the completion of the said union, in the manner provided in the said Act, which Board shall administer the property according to the same principles and for the same objects as at present, and it is declared that these rights shall be established as follows:—

1. The annual payment to ministers now receiving four hundred and fifty dollars ($450), four hundred dollars (400), or two hundred dollars ($200), will be the same amount during their lifetime and good standing in the Church. (2.) The annual payment of two thousand dollars ($2,000) granted to Queen's College, will be continued in perpetuity. (3.) The annual payment of two hundred dollars ($200) to all the ministers who shall be on the Synod's roll, and by all recognized probationers and licentiates engaged in active service at the time of the union, will remain the same during the lifetime and good standing in the Church of such ministers, probationers or licentiates; all salaries of two hundred dollars to be increased to four hundred dollars each when the recipients of them shall have retired from the active duties of the ministry. The Temporalities Board shall if necessary draw upon the capital of the fund to meet the aforesaid requirements. Then it is provided that so soon as any part of the revenue accruing from said fund, or any part of the fund itself which is not required to meet the payments of said charges, shall be subject to the disposal of said united Church.

2. That all ministers and probationers possessing rights in the said temporalities fund who decline to become parties to such union of the said churches shall be entitled nevertheless to all their rights as if they had entered into such union, so long as they shall continue to be Presbyterian ministers in good standing within the Dominion of Canada; and that the successors of these ministers shall retain the same rights in the said fund, as if the union of the said churches had not taken place.

3. That as often as any vacancy in the board of management of said temporalities fund occurs, these beneficiaries may each nominate a person being a minister or member of the said united church, or in the event of their being more than one vacancy, then one person for each vacancy and the remanent members of the said said board shall thereupon, from among the persons so nominated as aforesaid, elect the person or number of persons necessary to fill such vacancy or vacancies, selecting the person or persons who may be nominated by the largest number of beneficiaries, but in the event of failure on the part of the beneficiaries to nominate as aforesaid, the remanent members of the board shall fill up the vacancy or vacancies from among the ministers or members of the said united church. Section 8 provides that the third section of this Act shall continue in force until the number of beneficiaries is reduced below fifteen; and so soon as the number of beneficiaries is reduced below fifteen, the said board shall be continued by the remanent members filling up any vacancy or vacancies from among the ministers or members of the said united church. The remaining enactments of this act apply only to the rules of procedure to be followed in the election of new members of the board, in case of vacancies, and for the auditing of the accounts of the administrators. The last provision is that this act shall come into force so soon as a notice shall be published in the *Quebec Official Gazette* that the union of said four churches has been consummated.

These several statutes having been sanctioned and in force, the Synods of the four churches, the union of which was authorized by the corresponding statutes of Quebec and Ontario, assembled in Montreal in June, 1875, to consummate the proposed union. Agreeably to a previous understanding with the other churches, the Synod of the Presbyterian Church of Canada in connection with the Church of Scotland, assembled in St. Paul's Church, in Montreal, and on the 14th June, 1875, decided by a very large majority, that on adjourning next morning it would proceed to the Victoria Hall the appointed place, for the consummation of the said union and the holding of its general assembly of the said churches, under the name of the general assembly of the "Presbyterian Church in Canada," and at the same time gave full power to its moderator to sign in the name of the Synod, the preamble and the basis of union and also the resolutions adopted relating to those documents. The peti-

tioner and nine other members of Synod protested in writing against this resolution. The following day, the 15th June 1875, the Synod being assembled in the same place, a notarial protest was served on the Moderator against the projected union of the said churches, in the name of several members of the said Presbyterian Church of Canada, and among others of the petitioner. Notwithstanding this protest, the Synod adjourned to the Victoria Hall, as resolved the previous evening. Agreeably to this resolution, the great majority of the members of the aforesaid Synod proceeded to the Victoria Hall, where the members of the Synods of the other churches had also assembled, the documents relative to the union of the said churches were signed, and the members of the said Synods then organized themselves into a general assembly of the said united church, under the name of the "Presbyterian Church in Canada."

Nevertheless after the departure of this majority of the members of Synod of the said Presbyterian Church of Canada, in connection with the Church of Scotland for the Victoria Hall, the minority who had protested against the union, and who had remained in the building where the Synod met, chose the petitioner as Moderator, in place of the one who had left with the majority, and continued the proceedings of Synod of the said church. Persisting thenceforth in their refusal to enter the said united church, this minority continued to hold, each year, its annual Synodical meetings, declaring that it formed and constituted the Presbyterian Church of Canada in connection with the Church of Scotland, and that those persons who had adopted the Union, had abandoned the said church, and had voluntarily separated themselves therefrom, and no longer formed a part thereof. Starting from this point, the petitioner, after having stated in his petition, his quality of minister of the Presbyterian Church of Canada, in connection with the Church of Scotland, and his right to an annual revenue of $450 for life from the Temporalities Fund of the said church, as being one of those who in 1855 profited by the commutation offered by the Government of Canada, and alleged that this fund had been created, subject to the conditions formally stated in the resolution of Synod, conditions recognized and guaranteed subsequently by the Act of incorporation of the board to whom was entrusted the administration of the fund, adds :—

That the statute of the Province of Quebec, 38 Victoria, ch. 64, amending the Act of incorporation of the said Temporalities board, is unconstitutional, that it exceeds the jurisdiction and authority of the Legislature of the said Province, and consequently is null and of no effect. The reasons stated by the petitioner in support of this allegation are: 1st. That the powers granted to the corporation under the Act of the Parliament of Canada, 22 Victoria, c. 66, are not limited, and applicable to one Province only, but are of a general nature, and affect the rights of persons resident in the two Provinces of Quebec and Ontario. That consequently the Act of the Legislature of Quebec amending this Statute is not of a local and private nature, but affects the rights of persons not resident in this Province, and not subject to the jurisdiction of its Parliament, and therefore is in excess of its authority. 2nd. That the rights and interests of the petitioner in the Temporalities Fund of the said Presbyterian Church are not of a private nature, but are a matter of general interest. 3rd. Lastly, that the said Provincial Act is unconstitutional: 1st. In that it authorizes the payment of the annual allowances to the ministers who have ceased to be members of the Presbyterian Church of Canada in connection with the Church of Scotland. 2nd. In that it allows the corporation respondent to draw on the capital of this fund to pay the annual allowances. 3rd. In that it provides for the filling of vacancies in the Temporalities Board with members of the United Church; thus depriving the beneficiaries of all right of administration of the said fund, contrary to the dispositions of the Act creating the said corporation. Consequently the petitioner alleges that the Provincial Act has no legal existence, that the Statute of 1858 alone is in force, and that the rights of the parties are governed by its provisions.

The petitioner then alleges that since the 15th June, 1875, the Revs. John Cook, James C. Muir and George Bell became members of the said United Church, styled the Presbyterian Church in Canada, which is an entirely distinct organization from the Presbyterian Church of Canada in connection with the Church of Scotland; that they abandoned this latter Church and ceased to be members thereof, and therefore have no right in the benefits resulting from said Temporalities Fund. That the Revds. John Fairlie, David W. Morrison and Charles A. Tanner, who receive annual allowances from the said fund, have no right therein; firstly, because they are not among the number of those ministers who, in 1855, commuted their claims with the Government, and secondly, because they have also abandoned the said Presbyterian Church of Canada in connection with the Church of Scotland, to become members of the new Presbyterian Church in Canada.

Let us say, before proceeding further, that of the six ministers just named only one is a party to this cause, the Rev. John Cook, and consequently

the rights of the others, who have not been impleaded, cannot in any manner be affected by the judgment of this Court.

Lastly, the petitioner alleges that, by the terms of the Statute of 1858, four of the members of the Temporalities Board were bound to retire and to be replaced each year, and that in order of seniority, the Rev. Messrs. Jenkins and Lang and Messrs. Walker and Dennistoun ceased to be members of the Board in June, 1876; the Rev. Messrs. Cook and Gordon and Messrs. Morris and Sir Hugh Allan, also ceased to be members of the Board in June, 1877; that the Rev. Mr. Mackerras and Messrs. Darling and Mitchell ceased to be members of the Board in June, 1878, and that none of them have been regularly replaced agreeably to the Statute of 1858; lastly, that the only remaining member of the said Board, namely, Mr. James Michie, withdrew from the said church and joined the Presbyterian Church in Canada, and consequently has *ipso facto* lost his quality as a member of the said Board. That consequently all the said respondents administer illegally the property of the said Presbyterian Church of Canada in connection with the Church of Scotland, and have no right to act as members of the Temporalities Board of the said church. The petitioner concludes:—1st. That the Provincial Act, 38 Vic., ch. 64, amending the Act of incorporation of the Temporalities Board of the said Presbyterian Church of Canada in connection with the Church of Scotland be declared unconstitutional, as beyond the competency of the Legislature of Quebec. 2nd. That it be declared that the corporation respondents have acted illegally and have exceeded their powers in allowing the respondents to act as members of the said Board without their being elected in accordance with the law. 3rd. That it be declared that the respondents have no right to act as members of the said Board, and that they be restrained from so doing. 4th. Lastly, that it be declared that the fund administered by the said Corporation respondents, is in itself only a trust for the benefit of the Presbyterian Church of Canada in connection with the Church of Scotland, and of the members and missionaries who have remained members of the said Church, and for no other purpose. That the Revds. John Cook, James C. Muir and George Bell, have ceased to be members of the said Church, and consequently have no right to the benefits of the Temporalities' Fund, and that the said John Fairlie, David W. Morrison and Charles A. Tanner are also without any rights therein.

Two of the respondents, the Rev. Gavin Lang and Sir Hugh Allan, declared that they did not contest this application and put themselves in the hands of the Court; the other respondents have pleaded.

The respondents who pleaded have declared in substance, that the Church heretofore styled the Presbyterian Church of Canada in connection with the Church of Scotland, has always been, from the time of its organization in this country, in 1831, a voluntary and independent association, and that the terms "in connection with the Church of Scotland" embraced in its name have never been understood as expressing the idea of a right of jurisdiction or of control in any manner possessed by the Church of Scotland over the said Church. That, on the contrary, the independence of the said Presbyterian Church of Canada in connection with the Church of Scotland, and the absolute power of jurisdiction and of discipline of its Synod over the said Church and the congregations composing it, its ministers and members, have always been recognized by the Church of Scotland, and affirmed in this country on different occasions, and notably by a solemn declaration made in 1844, and which thenceforth formed one of the fundamental principles of the constitution of the said Church, a principle to which each minister receiving ordination in the said Church was bound to give a formal adhesion, as the said petitioner did on becoming a member of the said Church. That this supreme and independent power, possessed by the Synod of the said Church in all that concerned it, has always been acknowledged and accepted, and that in 1855, at the time of the commutation of the rights resulting from the "Clergy Reserves," the Government of Canada refused to consent to a settlement with the ministers thereof, individually, and only consented to make this arrangement through the Synod, acting by their representative commissioners for the general interests of the said Church; and that the fund derived from this commutation was subjected only to two conditions, as stated in the resolution of the Synod. 1. The primary claim of all the then ministers to an annual allowance of $450 for life. 2. The next claim in favor of all ministers placed on the Synod's roll subsequent to the 9th of May, 1853, date of the sanction of the Imperial Act authorizing the Provincial Legislature to manage the "Clergy Reserves." That the corporation thenceforth charged with the administration of this fund, held it subject to the control of the Synod, and for the benefit of said Church governed by such authority. That in 1875, the Synod of the said Church, after five years' deliberation, acting at all times in virtue of its supreme authority in whatever related to the said Church, resolved, almost unanimously, to unite the said Presbyterian Church of Canada, in connec-

tion with the Church of Scotland, with the three other churches afore mentioned, these four churches having the same faith, the same beliefs and the same doctrine, and that in so doing the said Synod had not renounced to any of the principles, beliefs or doctrines of the said Church, but on the contrary it had preserved and maintained them intact, and that the said Church is at present in existence with the same doctrine, and for the same objects, the same organization, and also with the same rights, properties and estates under the name of the "Presbyterian Church in Canada" and that it maintains the same connection as heretofore with the Church of Scotland. That the petitioner and the nine ministers, who continue with him outside the said union, have no right to pretend to continue the said Presbyterian Church of Canada in connection with the Church of Scotland, and that in fact they are dissentients, voluntarily separated from the said Church. That consequently they could not even have possessed the right to an allowance from the Temporalities fund, had it not been through the good will of the Synod which, by the legislation, sought and obtained from the Parliaments of Quebec and Ontario, preserved to them the maintenance of such privileges notwithstanding their separation. Lastly, that the Acts passed to establish the union of the said churches and for the modification of the statute incorporating the Temporalities Board of the said Church are valid, and, therefore, that the petitioner is not justified in his complaint.

As appears by the examination of these proceedings, the opposing parties seem to agree on opening the door wider for the interference of the civil power in church matters. The answer to this plea is not of a nature to restrict the litigation to a strictly legal basis; as after having stated that the share of the clergy of the said church in the proceeds of the "clergy reserves," was only so awarded because this clergy formed part of and belonged to the established Church of Scotland, and that this "temporalities fund" had been constituted on the express condition that it should only be used for the purposes of the Presbyterian Church of Canada, in connection with the Church of Scotland; the petitioner adds that this church is not identical with, but on the other hand, altogether distinct and different from the new Presbyterian Church in Canada, which is composed of bodies or associations which have detached themselves in turn, either from the Church of Scotland or from the Presbyterian Church of Canada, in connection with the Church of Scotland. Consequently the allegation of respondents: that the said Presbyterian Church in Canada is the same as the Presbyterian Church of Canada in connection with the [illegible]h of Scotland, is unfounded. Lastly, [illegible] establishes and details, moreover, the reasons for this division between the petitioner and his partisans on the one side, and the majority of the Synod on the other. What is charged against the respondents is: 1. Their having, by this union of the said churches, agreed to renounce the connection which the Presbyterian Church of Canada had always carefully maintained with the Church of Scotland. 2. Their having agreed to declare by the articles of union signed by the said united churches, that the belief in a portion of "The Westminster Confession of Faith" is not obligatory. It is unnecessary to say that those who have accepted the union repel these accusations. They maintain on the first point, that the connection of the said Church with that of Scotland has never implied any subordination whatever, but simply an interchange of good will which exists to an equal extent to-day between the Church of Scotland and the new organization. On the second point, they affirm that the declaration which they have signed does not imply any change of faith; that they have simply acknowledged that the 23 cap. of the confession of faith cannot be interpreted as sanctioning principles opposed to liberty of conscience in matters of religion, and that such has always been the belief of the said church prior to the union.

We have just reached the crowning point of the religious aspect of this case, and I have only sought thus to expose it by a gradual analysis of the pretentions of the parties, the better to demonstrate that there is not in reality at the bottom of this part of the dispute more than a question of appreciation of religious doctrines, altogether beyond the jurisdiction of a civil tribunal and consequently not for me to decide. I am, moreover, convinced that the pretensions of the parties, as they stand to-day before me, may be decided by resting scrupulously within the domain of law. I therefore make it my duty carefully to eliminate from this cause all that is not of a strictly judicial nature, and thus reducing this litigation to its true proportions I arrive at the examination of of the only question on which my decision should be based.

By his conclusions, the petitioner confines himself in reality to asking but two things. 1. That the Provincial statute, 38 Victoria, cap. 64, be declared unconstitutional; from which would naturally flow the illegality of the present constitution of the "Temporalities Board," and the nullity of the acts done by the respondents as members of that corporation. 2. That it be declared that the "Temporalities Fund" is the exclusive property of the Presbyterian Church of Canada, in connec-

tion with the Church of Scotland, and subsidiarily that the Reverends John Cook, James C. Muir, George Bell, John Fairlie, David W. Morrison and Charles A. Tanner are no longer members of the said church, and consequently have no rights to the benefis arising from this fund. The petitioner thus attacks directly, by his first pretension, the constitutionality of the Provincial statute of Quebec, 38 Victoria, cap. 64, and by the second, indirectly, the constitutionality of the statutes of Quebec and Ontario, as respects the union of the four churches aforementioned (38 Victoria, cap. 62, Quebec, and 75 Ontario). For if these two Legislatures have not exceeded their powers in passing these laws, the petitioner has not in the present law any remedy for redressing the grievances of which he complains.

It is much to be regretted that these important questions as to the constitutionality of the laws have not been intrusted by our new political constitution to a special tribunal, whose jurisdiction and authority in like matters would be unquestioned. The ordinary tribunals thus find themselves charged therewith unaided by any very precise rules to guide them, and it is necessary to seek elsewhere what our too short experience of a federal system does not enable us to find here. Although there exists a fundamental difference between the American federal constitution and that of the Canadian Provinces, since in the United States, the Federal powers have been delegated by the States to the central government, whilst here it is rather the powers of the provincial Legislatures which have been specially delegated, and consequently limited; nevertheless the principles accepted by the American jurisconsults and by the tribunals of the neighbouring republic on questions of the constitutionality of the laws, appear to me to afford rules of indisputable wisdom for the decision of like difficulties. "It has been said by an eminent jurist, says Cooley (On constitutional Limitations, p. 182) that when Courts are called upon to pronounce the invalidity of an act of legislation, passed with all the forms and ceremonies requisite to give it the force of law, they will approach the question with great caution, examine it in every possible aspect, and ponder upon it as long as deliberation and patient attention can throw any new light upon the subject, and never declare a statute void unless the nullity and invalidity of the act are placed, in their judgment, beyond reasonable doubt. A reasonable doubt must be solved in favor of the legislative action, and the Act be sustained." And further he adds, citing the words of Chief-Justice Marshall: "It is not on slight implication and vague conjecture that the Legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the Constitution and the law should be such, that the judge feels a clear and strong conviction of their incompatability with each other." Judge Washington gives as a reason in favor of this rule, after having said that the question submitted to him afforded room for doubt. "But if I could rest my opinion in favor of the constitutionality of the law on which the question arises on no other ground than this doubt so felt and acknowledged, that alone would, in my estimation be a satisfactory vindication of it. It is but a decent respect due to the wisdom, the integrity and the patriotism of the legislative body by which any law is passed to presume in favor of its validity until its violation of the constitution is proved beyond all reasonable doubt."

Such, in effect, is the fundamental rule which should guide a Judge in like cases. The presumption is always in favor of the constitutionality of the law. Let us examine at present, by the light of these principles, the dispositions of our constitution relative to the powers of the Provincial Legislatures, and the special statutes now under consideration, and see if there be even room for doubt, as to the right or power of the Provincial Legislature to pass the laws in question. The 91st section of the British North America Act 1867, declaring the powers of the Federal Parliament, says:—"It shall be lawful for the Queen, by and with the advice and consent of the Senate and House of Commons to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this act assigned exclusively to the Legislatures of the Provinces." * * * * * * This section then enumerates a general list of subjects, exclusively entrusted to the Federal Parliament; but declaring that this enumeration is not limitative, except as to the subjects exclusively intrusted to the local Legislatures. The 92nd section regulates and determines the exclusive powers of the Provincial Legislatures, and declares:—"Section 92. In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated; that is to say:—11th. The incorporation of companies with provincial objects. 13th. Property and civil rights in the Province.

Property and civil rights are thus, in virtue of this disposition of our present constitution, submitted to the exclusive control of the Provincial Legislatures. Now, what was the object of the corporation created by the Statute 22 Victoria, cap.

66? Nothing else than the ownership and the possession of certain property; that is to say that the Legislature of United Canada has accorded, by this Act, those rights which are included specially in the category of subjects exclusively entrusted at the present time to the Provincial Legislatures. It is true that under the former *régime* the two Provinces being subject to a Legislative union, these same rights were under the control of the Legislature of the Union, and consequently the privileges accorded in this respect to corporations created by this Parliament extended (except when specially restricted) to all the territory subject to its jurisdiction. But the extent of this territory, whether more or less, does not change any thing in the nature itself of these rights; and since these rights are now entrusted to the Provincial Parliament, can it be pretended that it has neither the right nor the power to legislate in a manner to affect them? Certainly not. The change in our political system cannot have had the effect of rendering perpetual what has been done in the past! It is to be assumed rather that property and civil rights then already in existence, and having been established in the past, as well as property and civil rights to be established for the future are made subject to the jurisdiction of the Provincial Legislatures. It must be admitted, therefore, that the changes which the Parliament of United Canada could have made, and no one will deny that it had the absolute right to make, in the Act of incorporation of the "Temporalities Fund," the Legislature of the Province of Quebec can make with the same authority and the same effect, within the limit of the territory attributed to its jurisdiction. But says the petitioner, it is exactly this restriction as to territory which saves my rights, not having a domicile in this Province I am not subject to the control of this Legislature, and therefore my rights cannot be affected by this legislation. This objection is not serious. The constitution, in subjecting property and civil rights to the control of the provincial Legislatures did not make and could not make a distinction between the possessors of these rights; it has not limited the legislative authority to the case where the property belonged to a resident only! No, all rights of property, whether possessed by a resident or or a non-resident, are under the authority of the legislative power of the Province. Any other interpretation of our constitution would be contrary to the best established principles of the civil law and of the public law. Therefore, either the rights which the petitioner claims exist in this Province, or they do not. If they do not, what can he seek from this Court? If they do, they only exist as recognized by the laws passed or maintained by our Legislature. Now, I find that this Legislature has changed the disposition of the property from whence flow the rights of the petitioner in two important respects; 1st, as to the administration; 2nd, as to the final disposition of the fund constituting this property. Firstly, as to the administration, the statute 38 Victoria, cap. 64, of which the annulling is sought, completely justifies the action of the corporation respondents, and of the members composing it. Secondly, as to the final disposition of the temporalities fund, the statute 38 Victoria, cap. 62, which is not attacked, while securing to the present ministers their annual incomes intact, transfers finally the property of this fund to the united church under the name of the Presbyterian Church in Canada. Now, it appears to me incontestable, according to the provisions of our Constitutional Act, that these two Acts, in so far as they affect civil rights and rights of property (and there are none other in question before this Court,) were within the authority and jurisdiction of our Provincial Legislature, and therefore that they irrevocably settle the rights of the parties. In the face of this legislation it is impossible for me to declare that the respondents have acted illegally and without right in the administration of the fund entrusted to them; that these same respondents are not legally members of the said corporation respondents, and that the "Temporalities Fund" does not belong to the Church, to which the law attributes it, and that it cannot be applied in the manner provided by that law. And if the petitioner seeks to complain of the arbitrariness and injustice of these legislative enactments which deprive him of rights of property which he considered inviolable, I must answer that it is not my mission to accord to him a protection which the law refuses, and that nothing would be more dangerous than for the courts to assume the power of rejecting a positive law under the pretext that it was unjust. "There would be (says Cooley, page 167,) very great probability of unpleasant and dangerous conflict of authorities if the courts were to deny validity to legislative action on subjects within their control, on the assumption that the Legislature had disregarded justice or sound policy. The moment a Court ventures to substitute its own judgment for that of the Legislature in any case where the Constitution has vested the Legislature with power over the subject, that moment it enters upon a field where it is impossible to set limits to its authority, and where its discretion alone will measure the extent of its interference. The rule of law upon this subject appears to be, that,

except where the Constitution has imposed limits upon the legislative power, it must be considered as practically absolute, whether it operate according to natural justice or not in any particular case. The courts are not the guardians of the rights of the people, except as those rights are secured by some constitutional provision which comes within the judicial cognizance. The protection against unwise or oppressive legislation within constitutional bounds, is by an appeal to the justice and patriotism of the representatives of the people. If this fail, the people in their sovereign capacity can correct the evil, but courts cannot assume their rights. The judiciary can only arrest the execution of a statute when it conflicts with the constitution. It cannot run a race of opinions upon points of right, reason and expediency with the law-making power. Any legislative act which does not encroach upon the powers apportioned to the other departments of the Government being *prima facie* valid, must be enforced, unless restrictions upon the legislative authority can be pointed out in the constitution and the case shown to come within them."

The writ of injunction issued in this cause must, therefore, be set aside, and the petitioner's demand rejected with costs.